COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
2010-SC-0091

COMMONWEALTH OF KENTUCKY — APPELLANT

V. DISCRETIONARY REVIEW OF 2008-CA-2172-MR
APPEAL FROM HANCOCK CIRCUIT COURT
INDICTMENT NO. 00-CR-00038

RANDY LEINENBACH — APPELLEE

BRIEF FOR APPELLEE, RANDY LEINENBACH

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CERTIFICATE REQUIRED BY CR 76.12(6)

The undersigned does hereby certify that ten copies of this brief were filed by placing them in United States Priority Mail, postage prepaid, for delivery to the Clerk of the Court and copies of this brief were served upon the following named individuals by first-class mail, postage prepaid, on this 31st day of March 2011: Hon. Ronnie Dortch, Judge, Hancock County Courthouse P.O. Box 250, Hawesville, Kentucky 42348-0250; Hon. David W. Barr, Assistant Attorney General, 1024 Capital Center Drive, Frankfort, Kentucky 40601; and Hon. Timothy Coleman, Commonwealth Attorney, P.O. Box 1038, Morgantown, KY42261-1038. The record on appeal was not removed by Appellant.

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INTRODUCTION

This Court has granted the Commonwealth's motion for discretionary review. Below the Court of Appeals reversed the trial court's denial of Leinenbach's 11.42 motion. The Court of Appeals held that Leinenbach was denied effective assistance of counsel when his trial counsel failed to object to jury instructions which gave the Commonwealth two opportunities to convict Leinenbach on two separate alleged rapes when he had only been indicted for a single count of rape. Appellee urges this Court to AFFIRM the opinion of the Court of Appeals.

STATEMENT REGARDING ORAL ARGUMENT

Appellant believes the issues are sufficiently set forth in the brief such that oral argument is not necessary on the issues presented herein.

STATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF MATERIAL FACTS

The following facts are taken from the Kentucky Court of Appeals decision denying Randy Leinenbach's direct appeal, *Leinenbach v. Commonwealth,* 2006 WL 2089877 (Ky. App. 2006) and granting the appeal of his motion pursuant to RCr 11.42, *Leinenbach v. Commonwealth,* 2008-CA-2172-MR. The trial stemmed from an allegation made August 12, 2000 by Pamela Leinenbach that her then husband, Randy Leinenbach, unlawfully imprisoned and raped her. Randy Leinenbach vehemently denied that he had raped or imprisoned his wife.

In November 2000, the Hancock County Grand Jury charged Randy Leinenbach in an indictment with a single count of first-degree rape and first-degree unlawful imprisonment. *Leinenbach v. Commonwealth,* 2006 WL 2089877, at *1. The indictment charged Leinenbach "[c]ommitted the offense of Rape in the first degree when he engaged in sexual intercourse with Pam Leinenback (sic) by forciable (sic) compulsion."

At the eventual trial in August 2005, the defense theory was that Mr. Leinenbach did not rape or unlawfully imprison his wife. Due to ineffective assistance of defense counsel, however, the defense theory was poorly presented. Although this case was essentially a swearing contest between Pam and Randy Leinenbach with no eyewitnesses to the alleged rapes, Randy Leinenbach did not testify at trial. This left the jury hearing only one side of the swearing contest. Nor was the credibility of Pam Leinenbach effectively and thoroughly attacked by the defense, although there was ample evidence available that she was not telling the truth. Although the defendant and his family presented defense counsel, Kevin Franke with numerous witnesses who could impeach

Pam Leinenbach with statements that she told them the rape and imprisonment did not occur and she did not wish to have Randy prosecuted, and witnesses that could testify to her reputation as untruthful, defense counsel did not present these witnesses at trial. Motion to Vacate, Set Aside, or Correct Sentence Pursuant to Kentucky Criminal Rule 11.42 ("11.42 Motion"), at *2. Defense counsel did not interview these witnesses. Id. The few witnesses that the defense used to advance its theory were not prepared or interviewed prior to trial, and when they were called by the prosecution they could not recall the events of the day in question. With the bad impression left by these unprepared witnesses, defense counsel simply gave up on calling witnesses after a single witness.

Pam Leinenbach testified that she and Randy Leinenbach met in 1991 and married in 1992. VR, 8/4/05, 2:52:40 *et seq*. They both had children from previous marriages. Id. During their marriage, after initially believing Randy "was the most wonderful man I ever met," Pam and Randy Lienenbach often argued and were separated on multiple occasions. Id. Pam Leinenbach testified that their final separation occurred in September 1999. Id. After this separation, Pam moved to Indiana and began seeing another man, Tim Voivedich. Id.

According to Pam's testimony, in August 2000, Randy Leinenbach and his roommate, Steve Wilcox, drove to Indiana where they saw Pam leaving the house of Tim Voivedich. Id., 2:59:23 *et seq*. According to Pam, Randy Leinenbach grabbed her by the back of her head, threw her into the passenger seat of the car. Id. No witnesses corroborated this account. Pam claimed Randy got into the driver's seat and struck Pam's head against the window and steering wheel and drove her to Kentucky. According to

Pam, while driving the truck Randy ripped her clothes off with his bare hands. Id. She claimed he ripped her blue jeans completely off her body so only a strip of fabric was left around her beltline. Id. She also claimed he ripped off her shirt and underwear. Id. According to Pam, he stopped the car in front of an abandoned farm and raped her in the front seat. Id. Again, there were no eyewitnesses to this alleged activity and no witnesses saw Pam with her clothing ripped off.

Randy Leinenbach then drove to his daughter's house. He honked the horn and his daughter, Julie Nix, and her husband, Steve, came outside. Pam told the jury that Randy told his daughter to bring her children out to the car so they could see Pam and how she truly was. Id. 3:05:00 *et seq.* Pam told the jury that since her clothes were ripped completely off, she tried to cover herself up with her hands. Id. Although Steve and Julie Nix testified that it appeared that Randy and Pam had been arguing, neither recalled Pam having had her clothes ripped off.

Randy then drove Pam to his trailer, located nearby. Id., at 3:06:35. Randy honked his horn and his roommate, Steve Wilcox came outside. Randy told Wilcox he wanted to be alone with Pam and then drove off. According to Pam, when they returned Randy sat her down in a recliner and went and obtained a fishing knife from the kitchen. She testified he then jumped on top of her in the recliner and held the knife to her throat. Pam claimed Randy then raped her two more times and poked her and cut her with the knife. She testified Randy then threw her on the floor and threatened to cut her head off and her heart out. At some point, Julie entered the trailer. She testified that she saw Randy fighting with Pam, but Pam was not undressed and she was not being raped.

Randy then drove Pam home to Indiana. Later that evening, Pam called her friend, Cathy Diamond who took her to the sheriff's office in Perry County, Indiana. There she reported the alleged rape and unlawful imprisonment.

The only witness called by the defense at trial was Cathy Diamond. She testified that when Pam called her on August 12, 2000, she told her that she and Randy had a little spat. VR, 8/5/05, 2:55:00 *et seq.* Later Pam changed her story and told Cathy that Randy had grabbed her, removed her pants, duct taped her mouth and put her in the trunk of her car. Id., 2:57:20 *et seq.* Pam said he drove her to the Ohio River bridge, where he made her walk across the bridge naked and then raped her. As Pam told Cathy this story she became hysterical. Pam began rubbing her arm to make it red, then Pam showed the arm to Cathy and said look what Randy had done to her arm. Pam insisted on going to the sheriff's office and Cathy drove her there. Pam asked Cathy to remind her of everything she had said so she could write it down. When Pam did write things down as a statement, it was different from what she had told Cathy. Id. Cathy accused Pam of lying about the incident. Pam told Cathy that she wanted to get even with Randy and this was the only way she knew how to do it.

Pam Leinenbach also told Karen Voivedich, and her brother, Tim Voivedich, that her allegations against Randy were not true. Soon after she made the allegations, Pam told Karen Voivedich and Tim Voivedich of the story she told the police. Pam then said that the allegations were not true and that Randy Leinenbach had not raped her. Karen Voivedich indicated that Pam should not make such accusations falsely. Pam said she it was wrong to tell such lies and said she had an appointment with an attorney on the

following Monday to see what would happen if she dropped the charge. This information was provided to defense counsel, but he did not call Tim Voivedich or Karen Voivedich as a witnesses at trial. When Ms. Voivedich showed up at the courthouse to testify, defense counsel told her she could not because she was not on the witness list.

Pam Leinenbach also told Randy's mother Marilyn Leinenbach and her own daughter, Amanda Sutton, that she did not want to proceed with the prosecution of Randy and wanted the charges dropped. 11.42 Motion, at *5. Pam said she told the prosecution this, but the information was not disclosed to defense counsel. Pam told Randy's brother, Michael Leinenbach, that she would drop the charges if he took her for a ride on his Harley-Davidson motorcycle. Defense counsel did not call any of these individuals at witnesses at trial.

Randy Leinenbach also provided defense counsel with the names and contact information for two witnesses, Shelly Young and Larry Holland. Id. These two individuals knew Pam Leinenbach well and knew she had a reputation for being untruthful. Neither were interviewed by defense counsel nor called as witnesses.

After the trial Leinenbach prosecuted a direct appeal to the Kentucky Court of Appeals, in which he argued that the trial court erred in denying his motion for a directed verdict, that his speedy trial was violated by the nearly five-year delay between the indictment and the trial, and that the court erred in allowing the Commonwealth to refresh the memories of two witnesses by using the FBI agent's interview summaries. The panel affirmed his conviction and this Court denied discretionary review.

Leinenbach then filed a motion to vacate, set aside or correct his sentence pursuant to RCr 11.42. One of the issued raised by Leinenbach was ineffective assistance of his trial counsel for failing to object to faulty jury instructions. Although indicted on a single count of rape, the instructions allowed the jury to render guilty verdicts for both the alleged rape in the vehicle and the subsequent alleged rape at Leinenbach's residence. The jury instructions were as follows:

INSTRUCTION NO. 5

RAPE IN THE FIRST DEGREE

You will find the Defendant, Randy Leinenbach, Guilty of Rape in the First Degree under this instruction, if and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in this county on or about August 12, 2000, and before the finding of the Indictment herein, he engaged in sexual intercourse with Pamela Leinenbach Morgan in the Olds Cutlass, AND
B. That he did so by forcible compulsion.

If you find the defendant [sic] guilty under this Instruction, please skip Instruction No. 6 and go to Instruction No. 7. If you find the Defendant Not Guilty under this instruction [sic], please go to Instruction No. 6.

INSTRUCTION NO. 6

RAPE IN THE FIRST DEGREE

You will find the Defendant, Randy Leinenbach, Guilty of Rape in the First Degree under this instruction, if and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in this county on or about August 12, 2000, and before the finding of the Indictment herein, he engaged in sexual intercourse with Pamela Leinenbach Morgan in the Defendant's residence, AND
B. That he did so by forcible compulsion.

The trial court summarily denied Leienbach's 11.42 motion without a hearing in a one-line opinion.

On appeal, the Court of Appeals found that the failure to object to these improper instructions deprived Leinenbach of effective assistance of counsel. 2008-CA-2172, at 6.

> Although the indictment against Leinenbach appears to charge him with only one count of rape, the jury was instructed on two counts of rape, one for the alleged rape in Pamela's car and one for an alleged rape in Leinenbach's residence. The jury acquitted Leinenbach of raping Pamela in the car but convicted him of raping her at his residence.

Id. at *2. The Court of Appeals found that the instructions improperly provided the Commonwealth "two bites at the apple' by giving the Commonwealth two opportunities to convict Leinenbach on a single charged offense, were not in conformity with the indictment, and improperly utilized jury interrogatories which required the jury to reach a mini-verdict, instead of one unanimous verdict regarding guilty or innocence. *Id.* at 6. Accordingly, the Court of Appeals reversed on this issue and remanded the case for trial with a properly instructed jury. *Id.* at *8.

Because the Court of Appeals granted a new trial on this issue, it did not address all of the issues raised in the 11.42 motion. Rather than remand for determination of prejudice and other issues, this Court should affirm the decision of the Court of Appeals granting Leinenbach a new trial.

The Court of Appeals found that Leinenbach was deprived of effective assistance of counsel when his defense counsel failed to object to the faulty jury instructions that provided the Commonwealth with two opportunities to convict him of one charged offense. The Court of Appeals found the two rape instructions were erroneous because

the instructions did not conform to the indictment, gave the Commonwealth two opportunities to convict him of one offense, and constituted an improper use of jury interrogatories.

The Commonwealth has not appealed the the Court of Appeals determination that the jury instructions were erroneous. Rather, the Commonwealth has appealed alleging that Leinenbach waived his claim of ineffective assistance of counsel regarding jury instructions by failing to appeal the issue on direct appeal, and on the Court of Appeals failed to expressly address and apply the requirement of prejudice in its *Strickland* analysis.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY FOUND THAT LEINENBACH'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL REGARDING JURY INSTRUCTIONS WAS PROPERLY RAISED IN HIS 11.42 MOTION.

The Commonwealth argues that Leinenbach's claim of ineffective assistance of counsel is procedurally barred for failure to raise the issue on direct appeal, citing *Hodge v. Commonwealth,* 116 S.W.3d 463 (Ky. 2003); *Haight v. Commonwealth*, 41 S.W.3d 436 (Ky. 2001) and *Baze v. Commonwealth,* 23 S.W.3d 619 (Ky. 2000). This argument fails because Leinenbach has raised his ineffective assistance of counsel claims in the proper forum as prescribed by this Court and because this Court has overruled the applicable portions of the cases cited by the Commonwealth.

The Court of Appeals' decision is consistent with this Court's prior decisions recognizing that ineffective assistance of counsel claims should be raised in an 11.42

motion and is not barred by a decision on a related but distinct issue on direct appeal. This Court has repeatedly made clear that an 11.42 motion is the proper and best forum to raise ineffective assistance of counsel claims. Ineffective assistance of counsel claims are best suited to collateral attack proceedings rather than direct appeal because:

> As a general rule, a claim of ineffective assistance of counsel will not be reviewed on direct appeal from the trial court's judgment, because there is usually no record or trial court ruling on which such a claim can be properly considered. Appellate courts review only claims of error which have been presented to trial courts. Moreover, as it is unethical for counsel to assert his or her own ineffectiveness for a variety of reasons, and due to the brief time allowed for making post trial motions, claims of ineffective assistance of counsel are best suited to collateral attack proceedings, after the direct appeal is over, and in the trial court where a proper record can be made. This is not to say, however, that a claim of ineffective assistance of counsel is precluded from review on direct appeal, provided there is a trial record, or an evidentiary hearing is held on motion for a new trial, and the trial court rules on the issue.

Humphrey v. Commonwealth, 962 S.W.2d 870, 872-73 (Ky.1998) (citations omitted). quoted approvingly in *Leonard v. Commmonwealth,* 279 S.W.3d at 159.

This Court has also held that appellate resolution of an alleged direct error cannot serve as a procedural bar to a related claim of ineffective assistance of counsel. *Leonard v. Commonwealth,* 279 S.W.3d 151, 158 (Ky. 2009). In *Leonard,* this Court overruled the three cases cited by the Commonwealth, *Hodge, Baze,* and *Haight,* among other cases that had previously held that a decision on the direct appeal may be a procedural bar to the ineffective assistance claim. *Id.* The decision in *Leonard* was based on *Martin v. Commonwealth*, 207 S.W.3d 1 (2006), which held that issues unsuccessfully appealed, even under the palpable error rule, RCr 10.26, can still give rise to a separate claim of ineffective assistance of counsel, which may be pursued in collateral proceedings.

Fundamental to the *Leonard* and *Martin* decisions is the recognition of the difference between an alleged error and a separate collateral claim of ineffective assistance of counsel related to the alleged error. *Leonard,* 279 S.W.3d at 158-59.

> Implicit in Martin is the notion that in most instances a direct appeal allegation of palpable error is fundamentally a different claim than a collateral attack allegation of ineffective assistance of counsel based on the alleged palpable error. This makes sense because the issue "raised and rejected" on direct appeal is almost always not a claim of ineffective assistance of counsel. Instead, the palpable-error claim is a direct error, usually alleged to have been committed by the trial court (e.g., by admitting improper evidence). The ineffective-assistance claim is collateral to the direct error, as it is alleged against the trial attorney (e.g., for failing to object to the improper evidence). Such a claim is one step removed from those that are properly raised, even as palpable error, on direct appeal. While such an ineffective-assistance claim is certainly related to the direct error, it simply is not the same claim. And because it is not the same claim, the appellate resolution of an alleged direct error cannot serve as a procedural bar to a related claim of ineffective assistance of counsel.

Leonard v. Commonwealth, 279 S.W.3d at 158-59.

Since an issue raised on direct appeal cannot serve as a procedural bar to a distinct, but related, ineffective assistance claim, when the issue is not raised on direct appeal it certainly cannot serve as a procedural bar. A procedural bar is based on having the same issue "raised and rejected" in a prior proceeding. *Leonard,* 279 S.W.3d at 158. The procedural bar, like res judicata or issue preclusion, prevents the party from re-litigating an issue which was "raised and rejected" on direct appeal. *Id.*

Here, a related issue was not even raised on direct appeal, so the issue has not been previously rejected. There is no prior claim to serve as a procedural bar. While Leinenbach may be precluded from raising the direct error of the faulty jury instructions, because it was not raised on direct appeal, he is not precluded from raising a related claim

of ineffective assistance. "[B]ecause it is not the same claim, the appellate resolution of an alleged direct error cannot serve as a procedural bar to a related claim of ineffective assistance of counsel." *Leonard,* 279 S.W.3d at 158. The issue was properly raised for the first time as an ineffective assistance of counsel claim in the proper forum of an 11.42 motion. The Commonwealth's argument is without merit.

The Court of Appeals' decision on this issue is also consistent with this Court's recent decision in *Hollan v. Commonwealth,* ---S.W.3d---, 2010 WL 4679534 (Ky. 2010), recognizing the claim of ineffective assistance of appellate counsel ("IAAC") in Kentucky. In *Hollan,* this Court held that an 11.42 motion is the proper avenue to pursue an IAAC claim. Here, it would be illogical to deny Leinenbach's ineffective assistance of counsel claim regarding error by his trial counsel simply because his appellate counsel ineffectively failed to raise a related issue on his direct appeal. Two wrongs, or two ineffective counsels, do not make a right.

II. *COMMONWEALTH V. DAVIS*, ALTHOUGH NOT CITED BY THE COURT OF APPEALS, SUPPORTS LEINENBACH'S CLAIM AND SHOULD NOT BE OVERRULED.

The Commonwealth next argues that this Court should overrule *Commonwealth v. Davis,* 14 S.W.3d 9 (Ky. 1999). This argument is bizarre because (1) the Court of Appeals did not cite *Davis* in its opinion below, although the Commonwealth recognizes that *Davis* supports its decision, (2) the Commonwealth argues Leinenbach's decision is factually distinguishable from *Davis,* and (3) as its rationale for overruling *Davis,* the Commonwealth cites three cases that have been expressly overruled by this Court. *Hodge v. Commonwealth,* 116 S.W.3d 463 (Ky. 2003) *overruled by Leonard, supra,* 279 S.W.3d at 157; *Haight v. Commonwealth,* 41 S.W.3d 436 (Ky. 2001) *overruled by Leonard, supra,* 279 S.W.3d at 157; and *Baze v. Commonwealth,* 23 S.W.3d 619 (Ky. 2000) *overruled by Leonard, supra,* 279 S.W.3d at 157.

In *Davis,* this Court held "Where the ineffective assistance of counsel claim is that counsel erred by failing to object to jury instructions or to the introduction of evidence, it must first be shown that the jury instructions were given in error or the evidence was admitted in error." *Id.* at 11. This is consistent with *Leonard* and *Martin,* as well as the ruling by the Court of Appeals in the instant matter. The Commonwealth completely fails to address *Leonard* and *Martin,* or recognize that *Hodge, Haight,* and *Baze* have been overruled.

Davis is consistent with the law of the Commonwealth, and this Court should reject the prosecution's request to use this case to overrule *Davis,* a case not cited by the

Court of Appeals, when the Commonwealth's rationale for overruling *Davis* is three cases which have been expressly overruled by this Court.

III. LEINENBACH WAS PREJUDICED BY HIS TRIAL COUNSEL'S FAILURE TO OBJECT TO TWO SEPARATE RAPE INSTRUCTIONS STEMMING FROM AN INDICTMENT WITH A SINGLE RAPE COUNT.

The Commonwealth concedes that the Court of Appeals correctly determined that the jury instructions were erroneous, and thus the issue of the propriety of the instructions is not before this Court. *Ten Broeck Dupont, Inc. v. Brooks,* 283 S.W.3d 705, 738 (Ky. 2009) *quoting Wells v. Commonwealth,* 206 S.W.3d 332, 335 (Ky. 2006)("[I]ssues not raised in the motion for Discretionary Review will not be addressed by this Court despite being briefed before us and addressed at oral argument.") The Commonwealth appeals this issue only on the alleged basis that the Court of Appeals failed to address the prejudice prong of the *Strickland v. Washington,* 466 U.S. 668 (1984) standard for ineffective assistance of counsel. This argument fails, however, because the Court of Appeals did find prejudice and because prejudice is presumed from an erroneous jury instruction.

It is well established in Kentucky that an erroneous jury instruction is presumed to be prejudicial; and a party claiming such an error to be harmless bears the heavy burden of showing that no prejudice resulted from it. *Harp v. Commonwealth*, 266 S.W.3d 813, 818 (Ky. 2008)("In this jurisdiction it is a rule of longstanding and frequent repetition that erroneous instructions to the jury are presumed to be prejudicial; that an appellee

claiming harmless error bears the burden of showing affirmatively that no prejudice resulted from the error."(citations omitted)) The prosecution has not satisfied this heavy burden here.

The Court of Appeals correctly identified the prejudice to Leinenbach stemming from this erroneous instruction. The Court of Appeals found prejudice in that the Commonwealth was given two opportunities to convict Leinenbach on two separate alleged rapes, although he was only indicted on a single count of rape. 2008-CA-2172, at *6. This gave the Commonwealth "two bites at the apple" and deprived Leinenbach of a fair trial and a reasonable result. *Id.* at 6-7. The two bites were critical as Leinenbach was acquitted under the first instruction.The Court of Appeals found defense counsel's performance was "so prejudicial as to deprive a defendant of a fair trial and a reasonable result." Id., at *7. Leinenbach argued that this ineffectiveness resulted in a violation of his right to be free from double jeopardy and the Court of Appeals "f[ound] Leinenbach's argument on this issue to be persuasive."

This Court has recently reiterated that when the Commonwealth elects to broadly indict a defendant for a sexual crime that occurred during a general range of time, double jeopardy precludes a second bite at the apple for the same crime, during the same time frame, with the same alleged victim. *Applegate v. Commonwealth,* 299 S.W.3d 266 (Ky. 2009) The *Applegate* Court stated "we believe a defendant who is charged and convicted of a sexual crime that occurred during a range of time cannot subsequently be charged with the same crime against the same person during the period stated in the original conviction. *Valentine v. Konteh,* 395 F.3d 626, 629 (6th Cir. 2005). *See also Schrimsher v.*

Commonwealth, 190 S.W.3d 318, 327 (Ky. 2006) ("Appellant could defend himself from double jeopardy in any future prosecution ... by pleading his conviction in the case *sub judice* and requiring the subsequent prosecution to establish a different ... time frame of commission.")." *Applegate v. Commonwealth,* 299 S.W.3d 266, 271 (Ky. 2009). Here once Leinenbach was acquitted of raping Pamela Leinenbach on August 12, 2000 in Hancock County, Kentucky, double jeopardy barred his conviction for this offense. Prejudice resulted when he was convicted on the second bite at the apple.

Even without the double jeopardy violation, Leinenbach suffered considerable prejudice from the ineffectiveness of his counsel. The Court of Appeals recognized that the jury instructions were not in conformity with the indictment, improperly utilized a jury interrogatory, and resulted in an unfair trial in which the Commonwealth prosecuted two alleged rapes although the indictment charged only one.

This is not a case in which the change in the instructions does not reflect a change in the Commonwealth's theory of the case nor a change in the alleged method or facts of the case. In cases where the instructions are merely changed to include a complicity allegation or a lesser included charge, prejudice to the defendant may not be as great. *Commonwealth v. Combs,* 316 S.W.3d 877, 882. Here, the instructions differed from the indictment in that the instructions charged an additional rape, of which the Leinenbach had no prior notice. The Grand Jury alleged in general terms that Leinenbach committed a rape, but it did not allege with specificity whether the act occurred in the vehicle or later at the residence. *Leinenbach v. Commonwealth,* 2008-CA-2172-MR, at *4. Only when Pamela Leinenbach took the stand and alleged that he had raped her once in the car, and twice at the house did Leinenbach hear evidence that he was on trial for two, or even

three, different rape allegations. *Id.* The prejudice to Leinenbach by this surprise was compounded by his trial counsel's failure to obtain the entirety of Pamela Leinenbach's written statement to law enforcement prior to trial. VR, 8/04/05, 1:56:00 *et seq.* This failure by trial counsel to obtain the written statement of the alleged victim prior to trial signifies the profound ineffectiveness of his assistance and resultant prejudice to Leinenbach.

This situation here is more consistent with the facts in *Wolbrecht v. Commonwealth,* 955 S.W.2d 533 (Ky. 1997), where the defendant was "unduly and unfairly surprised near the conclusion of the Commonwealth's case with a new charge..." *Id.* at 537. In *Wolbrecht,* the defendants were charged with complicity to murder, and the indictment specified that one of the defendants was the murderer. Five days into trial, the trial court permitted the indictment to be amended to charge that the murderer was an unknown person. Deeming this amendment to be a "dramatic, 180 [-]degree turn in the case[,]" this Court reversed because the instructions no longer conformed to the indictment. *Id.* When the instructions do not conform to the indictment and charge the defendant with a new offense, the prejudice to the defendant's substantive rights is clear. *Id.* The defendant is denied pre-trial notice of the allegation and that he will be tried upon this allegation, denied the opportunity to develop and present a defense to the new allegation to the jury, and subjected to the risk of a compromised verdict from the jury. Here, the Commonwealth never amended the indictment or sought indictment of Leinenbach on two separate rape allegations. Leinenbach began the trial believing he was on trial for a single allegation of rape, and due to ineffective counsel, by the time of jury instructions was defending two separate rape allegations.

CONCLUSION

For the above reasons, Randy Leinenbach respectfully requests that this Court AFFIRM the decision of the Court of Appeals.

Respectfully submitted,

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